SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. [redacted] 290

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
APPELLANTS,

vs.

UNITED STATES OF AMERICA, APPELLEE.

MOTION TO REASSIGN.

EDWARD S. JOUETT,
Of Counsel for Appellants.

"That in the event the decree of this court denying the injunction prayed by the petitioners and dismissing their bill should be reversed by the Supreme Court, a *great and irreparable* injury would in the meantime have resulted to the petitioners by reason of the diversion of part of their traffic entering and leaving Nashville by competing railroads enabled to obtain access to local industries on their lines through the enforcement of the order of the Interstate Commerce Commission, and the expense and disturbance of their business caused by changing their former practices in the meantime so as to comply with the order of the Commission and the publication of new tariffs." (Rec., Vol. I, p. 78.)

and that

"on the other hand, it does not clearly appear that any particular individuals would suffer material financial injury in the event the order of the Commission is stayed for a short time so as to enable the petitioners to perfect their appeal and to present to the Supreme Court an application for a preliminary suspension of the Commission's order pending the hearing of the appeal in the Supreme Court, in accordance with the practice recognized in Omaha Street Railway v. Interstate Commission, 230 U. S. 582, 583." (Rec., Vol. I, p. 79.)

The court thereupon modified its original proposed decree and temporarily suspended the Commission's

order until the appeal could be perfected and application made here for a stay lasting throughout the pending of the appeal. This, it held, was done,

> "in view *of the importance of the questions involved in this cause,* and *the irreparable injury which will result to the petitioners from the enforcement of the decree in this cause, if reversed.*" (Rec., Vol. I, pp. 79, 80.)

I.

The Court's Power to Grant this Relief.

We assume that counsel for appellees will not question either the power of this court to take jurisdiction of this motion, or the propriety of its doing so, since it was their contention in the argument before the lower court that the Supreme Court alone, and not the trial court, had jurisdiction of such a motion. In support of such contention they read and urged upon the court's consideration the case of Omaha Street Railway v. Interstate Commerce Commission, 222 U. S. 582. In that case, where the validity of an order of the Interstate Commerce Commission was attacked, this court, citing authorities, specifically held that it had the power to, and it did, suspend the Commission's order pending an appeal, though there, as here, the lower court had denied an injunction and dismissed the bill. It was upon the strength of this authority, specifically cited by the lower court, (Vol. I, p. 79) that the latter confined its order of suspension to such a period as would enable appellants to perfect their

appeal and make application to this court for the further suspension during its pendency.

But it may be suggested that this court is loath to consider applications of this sort because of the time involved in their hearing; and we are not unaware of the statement of the court in Leonard v. Ozark Land Co., 115 U. S. 465, 468, a somewhat similar case, that to avoid such practice becoming prevalent this court in 1878 promulgated Equity Rule 93 (New Number 74).

It will be noted, however, that according to the letter of that rule it does not quite cover our case. It reads as follows:

> "When an appeal from a final decree in an equity suit granting or dissolving an injunction is allowed by a justice or a judge who took part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending, modifying or restoring the injunction during the pendency of the appeal upon such terms, as to bond or otherwise, as he may consider proper for the security of the rights of the opposite party."

While application was made in this suit for an interlocutory injunction and a temporary restraining order, neither was in fact issued because, at the conclusion of the hearing upon plaintiff's motion therefor and upon defendant's motion to dismiss, the Interstate Commerce Commission, at the suggestion of the court, extended the effective date of its order here involved until a time after the decision of the court, though the court's

decision denying the injunction and dismissing the bill was not rendered until four months after the hearing.

Under these circumstances it was manifestly unsafe to wait until an appeal should be taken and then rely upon applying to the lower court for a stay order upon the claim that the *spirit* of Rule 74 entitled us to it because, though no formal injunction had ever been issued, a sort of voluntary one had been in effect. We should undoubtedly have been met with the contention that the lower court was confined to the *letter* of this rule, and had no power to grant a suspension where no injunction had in fact been issued. We did, therefore, all that could be done when we applied to the trial court for the suspension as a part of its final decree. It was our view that the trial court's suspension could have been made to apply during the entire pendency of the appeal, but, evidently because of the argument of defendant's counsel that under the authority of the Omaha Street R'y case, *supra,* the Supreme Court should be permitted to determine this question for itself since it had cognizance of the appeal, the lower court confined its stay order to such period as would allow this court to consider it and extend it throughout the appeal if it saw fit so to do.

We respectfully submit, then, that whatever may be the policy of the court in the matter of preferring not to take cognizance of applications for suspensions where the parties might have proceeded in the lower court under Equity Rule 74, such rule of policy does not apply here because this is not such a case.

Considering, then, that under the doctrine of the Omaha case this court has full power to maintain the *status quo* pending appeal, and that there is no established rule or policy against its taking cognizance of the motion, there remains the naked question whether the suspension should be granted.

II.

Precedents for Maintaining Status.

That the existing status be maintained, where practicable, pending an appeal is the underlying principle of the familiar doctrine of supersedeas, one of the cardinal features of appellate procedure. And where not to maintain such status might work great or irreparable injury this court and other Federal courts have time and again held that the power ought to be exercised.

A reference to some of the principal cases where the Federal courts have discussed the relief we are here seeking may be helpful.

A leading one is *Hovey* v. *McDonald,* 109 U. S. 150, where a certain fund, to which there were various adverse claimants, was placed in the hands of the receiver of the court. Upon final decree, the receiver was directed to pay the fund to the successful claimant. Meantime his adversary took an appeal, but, before a bond was executed, the receiver, acting under the verbal directions of the court to follow the decree, paid over the fund. The case was reversed, whereupon an attempt was made to hold the receiver personally liable for his

action in paying to the other party. The lower court refused to do this and the Supreme Court, in the second appeal, entitled as above, was called upon to review the lower court's action. The Supreme Court this time affirmed the case, holding that the receiver's action was proper since the mere taking of an appeal did not in itself operate as a suspension of the power of the court below to enforce its decree; but the question as to whether the lower court could have preserved the *status quo* by an order, if it had chosen to do so, arose and was considered. It was held that neither the dissolution of the injunction nor the *dismissal of the bill on its merits* affected the right of the lower court, if it saw fit to do so, to preserve the *status quo.*

In considering the *Slaughter House cases,* 10 Wall. 273, which held that an appeal or a writ of error did not nullify the order of the lower court, granting or dissolving the injunction, the court (in *Hovey* v. *McDonald*), speaking of the Slaughter House cases, said:

> "It was decided that neither a decree for an injunction nor a decree dissolving an injunction was suspended in its effect by the writ of error, though all the requisites for a supersedeas were complied with. *It was not decided* that the court below had no power, if the purposes of justice required it, *to order a continuance of the status quo* until a decision should be made by the Appellate Court, or until that court should order the contrary. This power undoubtedly exists, and *should always be exercised when any irremediable injury may result from the*

INDEX OF AUTHORITIES.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, ET AL., - - - - - - - - *Appellants,*

versus

UNITED STATES OF AMERICA, ET AL., - - *Appellees.*

BRIEF FOR APPELLANTS.

I.

STATEMENT.

This case relates to the switching practices of the three railroads that serve the city of Nashville, Tenn.—the Louisville & Nashville Railroad Company, Nashville, Chattanooga & St. Louis Railway, and Tennessee Central Railroad Company. Only a single question is involved and that is one of law. It is whether a certain joint terminal arrangement between the first two of these railroads constitutes an unlawful discrimination against the third, when the latter has had no part in the construction, maintenance or operation of these joint terminals, and hence is not admitted to their use. In other words, is this joint ownership and operation of terminals by the

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Except where otherwise specified, all italics are ours.

two roads a "switching for each other" which requires them to switch for the third if they would be free from the penalty of an unjust discrimination?

They voluntarily switch non-competitive cars between industries on their tracks and the point of interchange with the Tennessee Central; but they refuse to switch *competitive* cars—those whose road-haul service they themselves can perform at the same rate—because to do so is to turn over to their competitor for a nominal switching charge the valuable road-haul revenue accruing from the shipments moving to or from industries upon their own terminals.

Complaint was filed with the Interstate Commerce Commission by the city of Nashville and its Traffic Bureau to compel the first two roads to switch competitive cars between industries on their lines and the point of interchange with the Tennessee Central. The Commission held that the arrangement between the Louisville & Nashville and the Nashville, Chattanooga & St. Louis was in fact merely a "switching for each other" and hence their refusal to switch for the Tennessee Central was a discrimination which it ordered the two roads to cease, that is, by dissolving their joint terminals or by admitting the Tennessee Central to the equal commercial use of them. (28 I. C. C. 533.)

By "commercial" use is meant the beneficial enjoyment, through having the two roads handle or switch the T. C.'s cars, in contradistinction to an "actual" use which would result if the T. C. had access to their terminals with its yard engines.

This suit was brought by appellants in the District Court for the Middle District of Tennessee to enjoin the enforcement of the Commission's order; and from the decision of the lower court sustaining that order (227 Fed. 258) this appeal is taken.

The record is quite large, because, in order to avoid the presumptions incident to an incomplete record, it was necessary to file as an exhibit with the bill the entire transcript of evidence heard by the Commission. Little of this, however, is important here because out of the numerous questions involved only this one of discrimination was made the basis of the Commission's decision.

Examination of this transcript will be practically unnecessary, as the historical and physical facts upon which the case must be decided either appear in the opinions of the Commission and the court or will be stated in this brief, and not denied by opposing counsel.

There is involved, therefore, the single question as to the effect of these undisputed facts. As an aid to the court's convenient consideration of it, we shall endeavor, at the risk of appearing prolix, to take from the record and present in this argument all the facts essential to a complete understanding and correct decision of the controversy—with the invitation, of course, to counsel for appellee to supplement or criticise if we fall short of doing this.

loss to appellants is $192,530 per annum, which is more than $16,000 per month and over $500 per day.

Assuming that the hearing of this appeal can be especially expedited it is hardly possible that the loss of the two companies can be less than $100,000 by the time it is decided; and there is no possible theory upon which any of it can be recovered if the case shall be reversed.

In addition to this financial loss, there would be involved material expense to appellants and great confusion and inconvenience to all railroads and shippers throughout the country that do business with Nashville if new tariffs, now ordered to be put in, should, upon reversal by the Supreme Court, be retracted and the old system be uncontroverted.

C. C. Gebhard, Chief Clerk of the Traffic Department, of the Louisville & Nashville Railroad Company in his affidavit, filed upon the original motion for a temporary restraining order, thus describes the nature of the necessary advertisement of the new tariff and widens the number of persons to whom it must be distributed:

> "He says that in order to make legal publication of said tariffs it will be necessary for the Louisville & Nashville Railroad Company and the Nashville, Chattanooga & St. Louis Railway to distribute them to all of their local freight agents, general division and soliciting representatives, as well as to connecting lines throughout the country generally, and that he has made investigation of the lists of persons to whom those distributions will have to be made, and

he says that such lists include approximately 1,900 persons." (Rec., Vol. I, p. 57.)

But what of the loss to the public caused by the suspension, if this court also should hold that the two roads are switching for each other and hence should switch for the Tennessee Central? We cheerfully answer this question.

It must be borne in mind that the only shippers interested are those whose industries are located upon the tracks of the Louisville & Nashville and the Nashville, Chattanooga & St. Louis, and that this proceeding does not relate to the non-competitive cars, for they are already freely switched.

It applies, then, only to the movement, between those industries and the point of interchange with the Tennessee Central, of cars which are to go out or come in over the Tennessee Central to points of destination, or from points of origin, which the L. & N. or N., C. & St. L. can reach *at the same or a less rate*. It is thus apparent that the shipper ordinarily need suffer no financial loss, for he can ship out or in over one of these two latter lines (upon which his industry is located) at the same rate as over the Tennessee Central's, and, according to the evidence, can get equally as good, if not better, service.

Practically his only actual injury, then, arises in the case of the occasional inbound misrouted car, which by mistake comes in over the Tennessee Central instead of the road upon whose tracks the industry is located. In a case of this sort the contents of the car are drayed to

his industry, but even this rare occurrence does not ordinarily entail a financial loss, since the Tennessee Central, and not the consignee, pays the drayage charge, except where he made the mistake as to routing—a thing which practically never occurs.

In support of the above general statement of the situation, we call brief attention to the finding of the Commission itself, and to the testimony offered by the complainants themselves upon the hearing.

The Commission in its report says:

> "The virtually prohibitive charges imposed by defendants for switching competitive Tennessee Central traffic at Nashville cause Nashville shippers *little direct pecuniary loss.* Industries located on any of the three lines can avoid the switching charges imposed by the others by shipping over the line on which they are located."

There was a suggestion of possible, but largely speculative, disadvantage and inconvenience in connection with car shortages, consignors' preference of lines and milling-in-transit privileges, but even such imaginary cases were possible only in extremely few instances in comparison with the general volume of traffic.

As to the cases of misrouting, which alone furnish possible occasion for tangible monetary loss, we submit that the general statement of the Commission that "shipments are frequently misrouted" is misleading and not supported by the evidence if the word "frequently" is to be given its usual meaning, for the proof overwhelm-

ingly shows that, speaking relatively, instances of misrouting are extremely rare, and when they do occur, the cost of drayage is paid by the railroad where the misrouting is its fault.

Reference to certain illustrative testimony on this question may not be amiss—all of it from witnesses introduced by the Traffic Bureau of Nashville.

C. J. Bonner, furniture manufacturer, testified on direct examination that the existing switching rules had caused drayage or switching loss "a few times." (Rec., Vol. II, p. 67.) On cross-examination, he admitted that during a period of ten or eleven years, in which his shipments amounted to 2,400 cars, he only knew of two instances when this had occurred.

E. S. Morgan, a merchandise broker, testified (Rec., Vol. II, p. 95) that during a period of seven years, where the shipments aggregated from 4,900 to 5,600 cars, there were only five instances where he suffered loss on account of drayage, and it appears that of those instances only one or two of them were chargeable to the switching rules.

R. H. McClellan, a grain merchant, testified (Rec., Vol. II, p. 125) to suffering occasional slight inconvenience, but stated that in a period of eight years, involving the handling of 12,000 cars, he had had no material trouble with the switching rules.

Practically the same admissions were obtained on the cross-examination of the other witnesses.

IV.

The Merits.

While not directly involved in the hearing of this motion it is not irrelevant to here add to the allegations of the motion at least a statement of the issue. It is proper first to state in explanation of the large record that the reasonableness of the switching charge for non-competitive freight, and divers other questions of more or less moment, were involved in the trial below, but all of these questions are eliminated upon this appeal except the single one of discrimination, for the lower court rested its decision solely on that ground. See the assignment of errors (Rec., Vol. I, p. 84).

We are familiar with this court's holding in various cases that the courts will not review the Commission's findings of fact, and that this applies to the fact of discrimination as well as of the reasonableness of a rate, but this rule does not cover a case where the facts are undisputed and yet the conclusion therefrom involves an error of law. The trial court in its opinion (Rec., Vol. I, p. 61) concedes that "a conclusion which plainly involves, under the undisputed facts, an error of law" is reviewable by the courts.

Here, as stated, the facts are undisputed, and it is practically needless to go beyond the court's opinion to get all of them. The lower court and the Commission

found that these facts constitute a switching by one of the appellants for the other—a facility which each must also furnish to the Tennessee Central. We insist that as the two roads had actually in 1896 jointly acquired, under a 99-year lease from the holding company, the union station and principal terminal facilities, paying therefor nearly three million dollars; and as they in 1900, before the Tennessee Central came to Nashville, had by contract exchanged trackage rights over their individually owned terminal tracks outside of the jointly owned yards (a thing necessary to the proper enjoyment of the union station and other central jointly owned facilities, because the principal yards were located there), they had a perfect right, without opening the terminals to other roads, to operate those joint terminals, either separately or jointly.

They elected, as a matter of convenience (to prevent unnecessary interference of their switch engines and trains) and as a matter of economy, to jointly employ the superintendent, train crews, etc., and operate them jointly under a contract whereby at the end of the month each pays to the joint agency as nearly as possible the actual cost of the service it received. Solely because of this arrangement the Commission and court say that they are switching for each other, and hence must switch the competitive cars of the Tennessee Central over their terminals.

It means that they must with their own engines and crews handle the Tennessee Central's car over their ter-

local destinations, at a uniform charge of $2.00 per car; this switching charge being absorbed on competitive traffic by the railroad having the transportation haul, while on non-competitive traffic it was paid by the shipper or consignee.

"*On August 15, 1900, shortly after the completion of the terminal facilities by the Terminal Company,* the Louisville & Nashville and the Nashville & Chattanooga, *being then the only two railroads entering Nashville,* as a matter, primarily at least, of *economy in the operation of terminal facilities,* entered into an agreement under which *they have since maintained and operated joint terminal facilities at Nashville,* the effect of which is the underlying matter of controversy in this case. The essential provisions of this agreement are as follows:

"The two railroads created an unincorporated organization, styled in the agreement the 'Nashville Terminals,' and hereinafter called the Terminals, for the maintenance and operation of terminals at Nashville, embracing in such organization *all the properties, buildings, tracks, and terminal facilities leased to them by the Terminal Company, together with certain other individually owned tracks which they severally contributed and attached to said terminals,* consisting of 8.10 miles of main and 23.80 miles of side track contributed by the Louisville & Nashville, and 12.15 miles of main and 26.37 miles of side tracks contributed by the Nashville & Chattanooga. The agreement further provided: (a) That the entire properties thus included within the Terminals should be maintained and operated, as such, under the management of a Board of Control, consisting of a Superintendent of the Terminals and

the General Managers of the two railroads, the operation of the Terminals to be under the immediate control of the Superintendent, who should appoint, subject to the approval of the Board, a Station Master, Master of Trains, and other designated officers, each of whom should have a staff of employes for the conduct of his department; (b) that the expenses of maintaining and operating the Terminals should be apportioned between the two railroads as follows: passenger service expenses (including all expenses of the union passenger station) in proportion to the number of passenger train cars and locomotives handled by the Terminals for each; siding expenses (to be ascertained on the basis of the number of hours that yard engines were engaged in switching to and from house and private sidings, and bulk or team tracks, as compared with the total number of hours that they were engaged in all classes of service) in proportion to 'the total number of cars placed on and withdrawn from house and private sidings, bulk or team tracks (by the Terminals) for each' railroad; train yard expenses, in proportion to the number of all cars and train locomotives received and forwarded by the Terminals for each; and general expenses, in proportion to the average percentages of the three other expense accounts; provided, that before such apportionment of expenses, there should be deducted from the aggregate expenses all moneys received by the Terminals for room rents, restaurant and news-stands privileges, etc., and services rendered any other person; (c) that the separate freight stations and appurtenant tracks of each railroad and the tracks allotted to each for receiving and delivering bulk freights,

should be maintained and operated by the Terminals for each of them direct, and the expenses thereof charged directly to each; a like provision being made in reference to the operation of the terminal roundhouse for the Louisville & Nashville alone; (d) that each railroad should set apart and allot to the use of the Terminals, switching engines adequate to the work of switching and pulling trains in and about the Terminals, corresponding in efficiency to the proportion of work performed for each; which should be maintained and kept in repair by the Terminals and for which it should pay the railroads four per cent annually upon their valuation at the time of allotment; and (e) that the rights, privileges and uses of all the property in the Terminals by the respective railroads, should be 'the same, equal and joint, and none other,' except only as to the bulk tracks, etc., operated for each separately.

"In operating under this agreement *all the work of breaking up incoming freight trains of both railroads* after they come into the central yards of the Terminals, and of *collecting and making up outgoing freight trains for both railroads before they leave such yards,* is performed by the Terminals. Thus, when an incoming freight train comes in *on the line of either railroad* into the central yards, all cars destined for industries located within the Terminals, either on the tracks jointly leased to the Terminal Company or on the tracks of either railroad otherwise included within the Terminals, are switched by the Terminals to such local destination, without distinction as to the particular tracks on which such industries are located; and, conversely, freight cars loaded at industries located on any of such tracks for

transportation out of Nashville on the line of either railroad, are switched by the Terminals to the central yards and made up into the outgoing train. In other words, the entire switching service in reference to either the incoming or the outgoing freight trains of each railroad to and from the separate and joint tracks of both railroads, is performed by the Terminals, acting as joint agent of the two railroads under the Terminal agreement. However, in accordance with this agreement, *the only direct charge for such switching service is, in effect, made against the railroad having the transportation haul, in accordance with the provision that the siding expenses shall be apportioned between the two railroads* in proportion to 'the total number of cars placed on and withdrawn from house and private sidings, bulk and train tracks, for each of the parties.' Obviously, however, this apportionment of siding expenses does not represent the entire actual cost incident to the switching services, as it does not include any part of the general expenses and fixed charges of the Terminal, which are apportioned between the two railroads upon a different basis, as provided by the agreement.

"The interchange track between the Nashville & Chattanooga and the Tennessee Central at Shops Junction is within the switching limits of the Terminals under this agreement, but the interchange track between the Lousville & Nashville and the Tennessee Central at Vine Hill is outside of these switching limits.

"On December 3, 1902, the Terminal Company, the Louisville & Nashville, and the Nashville & Chattanooga entered into an agreement, reciting that the

two leases of April 27, 1896, from the railroads to the Terminal Company had been cancelled and abrogated; modifying the lease of June 25, 1896, from the Terminal Company to the railroads, so that thereafter it should only include certain tracks and parcels of land that had been directly acquired by the Terminal Company, and should be otherwise rescinded and abrogated and the properties of the railroads otherwise respectfully restored as they were prior to the lease, subject only to the mortgage that had been executed thereon by the Terminal Company to secure its issue of bonds; reducing the term of the lease to 99 years; and modifying in certain respects the provisions of the lease as to the rental to be paid.

"The Terminal tariffs of both railroads publish service by the Terminals and provide that '*there is no switching charge to or from locations on tracks of the Nashville Terminals, within the switching limits, on freight traffic, carloads, from or destined to Nashville' over either railroad,* 'regardless of whether such traffic is from or destined to competitive or non-competitive points.'

"The Tennessee Central entered Nashville in 1901-2, after strong opposition from the Louisville & Nashville, and leased its terminal facilities, consisting of a passenger station, freight depots, tracks, etc., from another Tennessee railroad terminal corporation that had been organized in 1893.

"Prior to 1907 neither the Louisville & Nashville or the Nashville & Chattanooga would interchange traffic with the Tennessee Central at Nashville or any other point of connection. In that year, however, they both began to interchange with the Ten-

nessee Central at Nashville all non-competitive traffic, exclusive of coal traffic, at the rate of $3.00 per car; non-competitive Nashville traffic being defined as traffic between Nashville and points reached only by one railroad into Nashville or points served by two or more railroads into Nashville for which, however, one railroad can maintain rates which the others can not meet. This interchange of non-competitive traffic between both the Louisville & Nashville and the Nashville & Chattanooga was and is effected by the connection between the Tennessee Central and the Nashville & Chattanooga at Shops Junction, there being no direct connection between the Tennessee Central and the Louisville & Nashville.

"On December 9, 1913, upon complaint by the City of Nashville, and others, the Commission found that the Louisville & Nashville and the Nashville & Chattanooga switched all traffic for each other at Nashville but refused to switch coal to and from the Tennessee Central except at a prohibitive rate, thereby unjustly discriminating against coal to and from the Tennessee Central in favor of coal to and from each other's lines, and entered an order requiring the Louisville & Nashville and the Nashville & Chattanooga to abstain from maintaining any different practice with respect to switching interstate carload shipments of coal from and to the Tennessee Central at Nashville from that maintained with respect to similar shipments from and to their respective tracks. The Louisville & Nashville and the Nashville & Chattanooga thereupon filed a petition in this court seeking to restrain the execution of this order and applied for an interlocutory injunction, which

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TABLE OF CASES.

In the Supreme Court of the United States.

OCTOBER TERM, 1915.

LOUISVILLE & NASHVILLE RAILROAD COMPANY et al., appellants,
v.
UNITED STATES OF AMERICA ET AL., APPELLEES.

No. 711.

SUGGESTIONS IN OPPOSITION TO AN APPLICATION FOR SUSPENSION OF AN ORDER OF THE INTERSTATE COMMERCE COMMISSION.

The complaint under which the order here attacked was made by the Interstate Commerce Commission was filed by the city of Nashville and the Nashville Traffic Bureau against the Louisville & Nashville Railroad Co., the Nashville, Chattanooga & St. Louis Railway, and the Louisville & Nashville Terminal Co. The Tennessee Central Railroad Co. and its receivers and the Nashville Terminal Co. were made defendants. As the Louisville & Nashville Terminal Co. is merely a nominal party, the word " appellants " as used in this brief refers to the L. & N. and the N., C. & St. L. alone. By the complaint filed with the Commission the rates, rules,

and practices of the carriers named as defendants affecting the interchange and switching of interstate traffic in the city of Nashville were attacked as unreasonable and unjustly discriminatory.

STATEMENT OF FACTS.

Prior to August 15, 1900, the Louisville & Nashville and Nashville, Chattanooga & St. Louis operated their respective terminals independently. Each road switched for the other at a charge of $2 per car, but on competitive traffic the switching charge was absorbed. Since August 15, 1900, all their terminal facilities, including the terminal buildings, tracks, and other facilities leased by them jointly from the Louisville & Nashville Terminal Co., except their individual team tracks and separate freight depots, have been maintained and operated jointly. The arrangement is called the "Nashville Terminals" and is managed by a board of three, composed of the general managers of the two roads and a superintendent of terminals. The total expense of maintenance and operation is apportioned monthly between the two roads on the basis of the total number of cars and locomotives of all kinds handled for each.

The Tennessee Central, which entered Nashville in 1901–2, after strong opposition from the Louisville & Nashville, leases its terminal facilities, consisting of a passenger station, freight depots, shops, main, side, and spur tracks, from the Nashville Terminal Co.

The appellants, through their unincorporated joint agent, the "Nashville Terminals," switch for the Tennessee Central any traffic for which neither of them competes at $3 per car, but traffic for which either of them competes they refuse to permit the "Nashville Terminals" to switch for the Tennessee Central except at prohibitive rates. The commission, after a full hearing, made an order requiring appellants to switch for the Tennessee Central both competitive and noncompetitive traffic on the same terms on which they switch such traffic for each other. The order also required the Tennessee Central to reciprocate and to desist from certain practices in the matter of the switching and interchange of interstate traffic, but that company is not complaining of the order of the Commission.

The motion for an interlocutory injunction and motions by the United States and the Interstate Commerce Commission to dismiss were heard by Circuit Judge Warrington and District Judges Sanford and McCall, and after full consideration those judges announced the conclusion that the motion for an interlocutory injunction should be denied and the petition dismissed. [Rec., vol. I, p. 59.] After the judges had filed their opinion, but before the decree was entered, the appellants made a motion for an injunction pending the appeal, and the judges inserted in their decree a provision staying the order of the Commission until this court should act upon a motion for such injunction, *provided* the appellants should perfect their appeal and present

their petition and motion to this court for the injunction within 30 days from the date of the decree, which they have done. Only two of the three judges concurred in this modification of the decree.

ARGUMENT.

Counsel for appellants state that the sole ground on which they attack the order of the Commission in this court is that the finding of the Commission that appellants switch for each other is an erroneous conclusion of law.

While this court has the inherent power to issue any writ necessary to the exercise of its jurisdiction, we insist that this is not a proper case for the exercise of that power.

I.

THE EXACT QUESTION INVOLVED UPON THIS APPEAL HAS BEEN DETERMINED BY THIS COURT.

In *Louisville & Nashville R. Co.* v. *United States*, 238 U. S. 1, this court had occasion to consider an order of the Interstate Commerce Commission requiring appellants to switch coal for the Tennessee Central at Nashville upon the same terms on which they switched coal for each other, and the court, referring to the reciprocal arrangement here involved, at page 18, said:

> Disregarding the complication arising out of joint ownership and the fact that each of the appellants switches for the other, it will be seen that the Commission is not dealing

> with an original proposition, but with a condition brought about by the appellants themselves. Under the provisions of the commerce act [24 Stat. 380] the reciprocal arrangement between the two appellants would not give them a right to discriminate against any person or "particular description of traffic."

But counsel for appellants say all the facts were not then before this court. If the facts were not before the court, it was the fault of appellants, who brought the case here upon the findings of the Commission without the evidence. The Commission in that case found that the appellants switched for each other without finding all the facts upon which that conclusion was based, and the appellants, choosing to accept that conclusion as correct, invoked the jurisdiction of this court to determine its legal effect. In that case this court commended the appellant for not making the evidence heard by the Commission a part of the record, but we may assume that in doing so the court did not anticipate that the failure to make that evidence a part of the record would later be used by the appellants as an excuse for reopening one of the questions presented in that case. Certainly, the appellants, having failed to avail themselves of the opportunity presented in that case to bring before the district court all the facts now presented, are not in a position to ask a suspension of the order of the Commission here involved pending the determination by

this court of the legal effect of facts, which they might have brought before this court in the former case. In that case this court, at page 10, said:

> The railroad companies did not offer all of the evidence which was considered by the Commission; and on this appeal they do not include in the record all of the hundreds of pages of testimony which had been submitted to the Commission; but—conceding that the evidence was conflicting and tended to support the findings of the Commission—they insist that the facts found were insufficient in law to sustain the orders which were made.

The appellants did, therefore, in that case concede that the evidence tended to support the finding of the Commission, which they quote on page 23 of their brief, and which they now say was incorrect, although, so far as appears, all the facts which now appear in this record appeared in the record before the Commission in that case.

II.

THE ORDER OF THE COMMISSION IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

The ultimate finding of the Commission is the finding of unjust discrimination, and that finding, although based on undisputed evidence, is a finding of fact. *United States* v. *Louisville & Nashville R. Co.*, 235 U. S. 314, 320. The basis of that finding is the finding that appellants switch for each other, and that finding appellants insist is not supported

by substantial evidence. The question is a simple one. The appellants have pooled their terminals and have placed the operation of these terminals in the hands of their unincorporated joint agent, called "Nashville Terminals," which switches for each of them. The sole question is whether or not the appellants by this device can avoid the charge of unjust discrimination, which it is conceded would exist but for the creation of the joint agency. This question was answered in the negative by the Commission and by the judges below. The latter said [Rec., vol. I, p. 70]:

> That each railroad does not separately switch for the other, but that such switching operations are carried on jointly is not, in our opinion, material. If it were, all reciprocal switching operations carried on by two railroads at any connecting point of several carriers could be easily put beyond the reach of the act and its remedial purpose defeated by the simple device of employing a joint agency to do such reciprocal switching. The controlling test of the statute, however, lies in the nature of the work done rather than in the particular device employed or the names applied to those engaged in it.

The Commission had jurisdiction to determine the question, and three judges having found not merely that there was substantial evidence to support the conclusions of the Commission but that its conclusion was correct, there is a strong presumption in favor of the correctness of that conclusion, es-

pecially in view of the fact that appellants conceded the correctness of a similar finding in *Louisville & Nashville R. Co.* v. *United States,* 238 U. S., 1.

Each of the appellants " contributes " its separately owned tracks to the " Nashville Terminals," and whatever trackage rights are created are given to that joint agent of the appellants. The appellants either switch for each other or the " Nashville Terminals " switches for each, and that is in effect what the Commission and the district court found. If the " Nashville Terminals " be treated as a separate entity it must treat all carriers and shippers alike, and must switch for the Tennessee Central on the same terms on which it switches for appellants.

III.

THE " IRREPARABLE INJURY " CLAIMED BY APPELLANTS TO HAVE RESULTED FROM THE COMMISSION'S ORDER IS SPECULATIVE AND RESTS UPON NO FACTS OF RECORD.

A majority of the three judges, in granting the temporary stay until this court could act upon this motion, found that the appellants would suffer irreparable injury if the order of the Commission should take effect and the decree appealed from should finally be reversed, and that it did not " clearly appear " that any " particular individuals " would suffer material injury from a temporary stay of the order until appellants could perfect their appeal and apply to this court for a stay. This implies, however, that the public would suffer

material injury from a longer stay. The irreparable injury claimed is the diversion of traffic to the Tennessee Central. The claim is that the freight revenues from the traffic which would be so diverted amount to $16,000 per month. Of course this is purely speculative, but assuming that the estimate of $192,000 per year represents the probable loss in freight revenues from the removal of the unjust discrimination which the Commission and the three judges have found to exist, the appellants in the 12 years since the Tennessee Central entered Nashville, assuming conditions to have been substantially the same during all that time, have received more than $2,000,000 in freight revenues which should have gone to the Tennessee Central. If such a large volume of traffic would be diverted it must be assumed that it would be because of some substantial advantage in service or in some other respect which would accrue to the public. The advantage to be gained from fair competition can never be accurately estimated. The unincorporated entity called the "Nashville Terminals" refuses to switch for the Tennessee Central, except at prohibitive rates, any traffic which might have come in or which might go out over either the Louisville & Nashville or the Nashville, Chattanooga & St. Louis, thus stifling competition. The object of the order of the Commission, which the three judges have found to be valid, is to restore competition at Nashville, and the statement of ap-

pellants as to the large amount of traffic which would be diverted to the Tennessee Central if the order should be put into effect shows that the order would have the effect intended. In view of the fact that the city of Nashville subscribed $1,000,000 to the stock of the Tennessee Central [Rec., vol. II, p. 285] in order, as we may assume, that the shippers of that city might have the benefit of the competition of that line with the lines of appellants, which are under a common control, it can not be assumed that such competition would not be of substantial value to the shipping public. Besides, the interests of the Tennessee Central can not be ignored, and there can be no doubt that the loss of appellants would be the gain of that carrier. The Tennessee Central, it is true, was not a complainant before the Commission, but the city of Nashville and the Nashville Traffic Bureau represented the interests of that line as against its codefendants just as clearly as they represented the interests of shippers, and unjust discrimination against that carrier was found to exist. Whatever tends to build up the Tennessee Central and to make it able to serve the public more efficiently is a matter of vital importance to the people of Nashville, and it will not do to say that because the appellants have for more than 12 years wrongfully diverted a large volume of traffic from the Tennessee Central no harm can come from permitting them to continue to do so for another 12 months or possibly longer.

If the Tennessee Central had received the $2,000,000 of revenue which the appellants say they have diverted from that line it may be that the road would not now be in the hands of receivers, and that the people of Nashville would have a line which would be able to compete much more effectively with appellants than the Tennessee Central is now able to do. The finding of the Commission and of the three judges, in effect, that the Tennessee Central is entitled to the $16,000 per month which appellants say would be diverted to that line by the order of the Commission certainly shifts the burden of proof, and as the Tennessee Central, if the judgment be affirmed, will have been wrongfully deprived of that revenue for 12 years, amounting to more than $2,000,000, the appellants ought to be required to take the risk pending the appeal rather than to impose upon the Tennessee Central the risk of that additional loss. The Tennessee Central and the people of Nashville would be just as powerless in the event of affirmance to establish the damage which they might suffer by the suspension of the order of the Commission as the appellants would be to establish their damage if the order should go into effect and the order of the Commission should finally be held to be void. The bond given by appellants, therefore, is of no real value.

But the real test of the loss which the appellants would suffer is not the gross revenue from the business which would be diverted, but the net revenue,

and this, it is estimated, would be about $100,000 per year. [Rec., vol. I, p. 45.] If appellants make a profit of $100,000 per year on the business which the order of the Commission would divert to the Tennessee Central, that line, it must be assumed, would realize a like profit from that business, and it must also be assumed that the shipping public would gain some material advantage by the diversion of the traffic, since otherwise the traffic would not be diverted. But we repeat that the claims made by appellants regarding possible financial injury are purely speculative and rest upon no facts of record.

IV.

THE POWER OF COURTS TO SUSPEND ORDERS OF THE INTERSTATE COMMERCE COMMISSION IS RESTRICTED WITHIN NARROW LIMITS.

The act of October 22, 1913, 38 Stat. L., 219, 220, which abolished the Commerce Court, provides:

> No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application.

When such application as aforesaid is presented to a judge he shall immediately call to his assistance to hear and determine the application two other judges. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the Interstate Commerce Commission, to the Attorney General of the United States, and to such other persons as may be defendants in the suit: *Provided,* That in cases where irreparable damage would otherwise ensue to the petitioner a majority of said three judges concurring may, on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension, in whole or in part, of the operation of the order of the Interstate Commerce Commission for not more than 60 days from the date of the order of said judges pending the application for the order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judges making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The said judges may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension, in whole or in part, until decision upon the application. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in

> every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for.

A comparison of these provisions with sections 263 and 266 of the Judicial Code, regulating the granting of restraining orders and injunctions in other cases, shows that Congress intended that greater care should be exercised in the matter of granting restraining orders and injunctions in suits to annul orders of the Interstate Commerce Commission than in suits of any other kind. While section 266 of the Judicial Code, applying to restraining orders and injunctions in suits to annul orders of state commissions, is more restrictive than section 263, which applies to restraining orders in suits between private citizens, the provisions relating to restraining orders and injunctions in suits to annul orders of the Interstate Commerce Commission are still more restrictive than the provisions of section 266. Under that section a single judge may grant a restraining order to remain in effect until the decision of three judges upon the motion for an interlocutory injunction, but in the case of an order of the Interstate Commerce Commission a temporary stay or suspension of the order can be granted only by a majority of the three judges, and then only for 60 days. In addition, the order must contain a specific finding "based upon evidence submitted to the judges making the order and identified by reference thereto"

that irreparable damage would result to the petitioner "and specifying the nature of the damage." It is true that the judges may, at the time of the hearing, continue the temporary stay or suspension in whole or in part until decision upon the application, but there must again be a like finding based upon evidence identified by reference thereto and specifying the nature of the irreparable damage. These provisions clearly indicate that it was the intention of Congress that orders of the Commission should not be lightly stayed or suspended pending action upon the application for an injunction, and that when a majority of three judges, upon full consideration of the application for an injunction, had determined that the Commission's order was supported by substantial evidence, that order should take effect. It is manifest that while Congress desired to guard against arbitrary action by the Commission, it considered that the approval of the orders of the Commission by a majority of three federal judges, at least one of them being a circuit judge, would furnish such a strong presumption in favor of their validity that such orders could safely be permitted to take effect pending an appeal to this court. It is clear that Congress intended that the courts should not interfere wih the orders of the Commission to any greater extent than might be necessary to give reasonable protection against arbitrary action or to prevent the Commission from exceeding its jurisdiction. We are not dealing here with a case in which the jurisdiction of the Commis-

sion is questioned, but with a case where the sole question is whether or not there was substantial evidence to support the finding of the Commission. The three judges, neither in their opinion nor in the order granting a temporary stay until this court should act upon the motion now made, have indicated the slightest doubt of the correctness of their conclusion. Indeed, the court went beyond what was required to uphold the order attacked and expressly approved the conclusions of the Commission.

Counsel for appellants seem to suppose that the parties to this appeal are the carriers on the one side and the shippers on the other, losing sight entirely of the fact that the injunction sought is against the Interstate Commerce Commission, a public administrative tribunal, whose decision here involved has already been reviewed and approved by three federal judges sitting in banc. Even if there be discretion to stay the order of the Commission after it has been thus approved, that discretion ought not to be exercised except in a very clear case.

V.

AS A GENERAL RULE THIS COURT WILL NOT MAKE AN ORDER TO MAINTAIN THE EXISTING STATUS UNLESS THAT STATUS EXISTS BY VIRTUE OF SOME ACT OF THE CHANCELLOR.

Where the chancellor has granted an interlocutory injunction the status thus created is one which exists by virtue of an act of the chancellor, and the same is true of the status which may exist by

virtue of the dissolution of an interlocutory injunction. While the status which may exist by reason of the dissolution of the injunction may be the same status which existed before any action was ever taken by the chancellor, it nevertheless exists by virtue of the chancellor's action in dissolving the injunction.

In *Chegary* v. *Scofield*, 5 N. J. Eq., 525, 530, where the question was as to the power of the New Jersey Court of Errors and Appeals to keep in force pending an appeal an injunction which had been dissolved by the chancellor, which restrained the sheriff from delivering a deed to the purchaser at a sheriff's sale, it was insisted for respondents that there was a distinction between the power of the court to restrain them from doing something which they derived their authority to do from the chancellor, and the power to restrain them from doing a thing which they were at liberty to do before any bill was filed, and the court held that while the distinction might be a sound one it had no application to the facts of that case. Chief Justice Hornblower, with whom a majority of the justices concurred, said:

> The argument is that as the chancellor only dissolved the injunction, the sheriff was at liberty to act just as he might have acted before the bill was filed. It was just as if no injunction had ever been issued; that he was not executing any decree; he was not proceeding in the cause; he was not doing anything

> for the doing of which he derived his authority from the chancellor.
>
> It seems to me the inconclusiveness of this argument must appear by simply asking the question whether, after this bill was filed and after the chancellor had granted the injunction, the sheriff could have delivered the deed without the chancellor's permission? Certainly he could not; and then it is by the authority and permission of the court of chancery, and in virtue of the chancellor's judicial decision, that he acts in the matter and delivers the deed. It is this very decree that the appellant complains of in this court, and he comes here to get it reversed.

In every case cited by counsel for appellants in which either the lower court or this court granted a stay pending appeal there had been a restraining order or interlocutory injunction in effect in the lower court at some time prior to the decision appealed from, and after diligent search we have been unable to find any case in which any court has granted an injunction pending an appeal from an order dismissing a bill for an injunction where no injunction or restraining order had been granted in the lower court prior to the final decision of the case.

In *Leonard* v. *Ozark Land Company*, 115 U. S., 465, 468, this court, by Mr. Chief Justice Waite, said:

> This court no doubt has the power to modify an injunction granted by a decree

below in advance of a final hearing of an appeal on its merits. An application to that effect was made to us at the October Term, 1878, in the case of the *Sandusky Tool Co.* v. *Comstock* [not reported], and finding that such a practice, if permitted, would oftentimes involve an examination of the whole case and necessarily take much time, we promulgated the present equity rule 93, which is as follows:

"When an appeal from a final decree in an equity suit, granting or dissolving an injunction, is allowed by a justice or judge who took part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending or modifying an injunction during the pendency of the appeal, upon such terms as to bond or otherwise as he may consider proper for the security of the rights of the opposite party."

The rule there quoted is now equity rule No. 74. The court did not provide for the granting of an injunction pending appeal where none had been granted, and it must have had a reason for not doing so. Since the court by the adoption of that rule was seeking to avoid an examination of the whole case upon such motions, it was just as important, if the two cases are governed by the same principle, to provide for the case where no injunction had been granted by the chancellor as it was to provide for a case where an injunction had been dissolved, and the fact that the former case was not provided for indicates clearly that it was the

view of this court that such an application should not in any case be considered.

To dismiss a bill for an injunction after full hearing, and without any expression of doubt as to the correctness of the conclusion that the petitioners are not entitled to an injunction, and yet by the same decree to grant an injunction pending an appeal would be an anomaly in the law, and for that reason, no doubt, equity rule No. 74 makes no provision for such a case. The failure to make provision for such a case indicates at least that the case which would warrant such anomalous action must be most unusual.

This court has the inherent power recognized in section 262 of the Judicial Code to issue any writ necessary to make its jurisdiction effectual. If it appears that the subject matter of the litigation may be destroyed pending the appeal or that the right of appeal will be of no substantial value, if the existing status is not continued pending the appeal, the court may make an order maintaining the *status quo*. The mere fact, however, that the appellant may suffer substantial financial loss pending the appeal if the *status quo* is not maintained furnishes no reason for maintaining the existing status if the right sought to be established by the appeal is a continuing one and would be of great value for the future. In such a case the jurisdiction is not dependent on the preservation of the existing status pending the appeal.

That writs of *supersedeas* will be granted by this court only in exceptional cases is shown by what was said *In re McKenzie*, 180 U. S., 536, 549. In that case the court said:

> Although the issue of the writ is not ordinarily required there are instances in which it has been done under special circumstances and in furtherance of justice.

This case is quite different from the case of *Louisville & Nashville R. Co.* v. *Siler*, 186 Fed., 176, 203. In that case a temporary restraining order was in effect when the district court acted upon the application for an interlocutory injunction, and that order was kept in effect by the district court pending an appeal denying an interlocutory injunction, but only upon condition that the appellant pay into court the difference between the existing rate and the rate prescribed by the suspended order of the railroad commission of Kentucky, and no objection was made to that part of the decree. In that case the appellant would have had no remedy for the loss suffered in the event of reversal if the order had gone into effect, while the shippers were given a reasonably adequate remedy in the event of affirmance by requiring the difference between the two rates to be paid into court. Besides, that was a suit to annul an order of a state railroad commission, to which a different statute applied.

In *Omaha & C. B. St. Ry. Co.* v. *Int. Com. Com.*, 230 U. S., 582, in which this court granted a stay pending the appeal, the Commerce Court had dissolved an interlocutory injunction, and this court restored that injunction pending the appeal. Besides, that was a case in which the jurisdiction of the Commission was in question, and not a case where the question was merely as to whether or not there was substantial evidence to support the order of the Commission. This court was called upon to determine whether or not the Commission had jurisdiction over street railways, and to make the jurisdiction of this court effectual the court thought it proper to restrain the Commission from exercising jurisdiction pending the appeal, the question being a new one.

In *Florida East Coast Ry. Co.* v. *United States*, 234 U. S., 167, where the jursdiction of the Commission was not in question, the motion for a suspension of the order of the Commission pending appeal was denied, although a preliminary injunction granted by the Commerce Court had been vacated. No opinion was delivered upon that motion, however.

It is not material that the effective date of the Commission's order was extended, in order that the three judges might have time, without embarrassment, to act upon appellants' motion for an injunction. Nor is it material that appellants, by reason of that fact, did not press their motion for a tempo-

rary restraining order until after the three judges had denied the injunction.

Now that the three judges have acted and have so strongly concurred in all the findings of the Commission, there ought to be no further stay.

CONCLUSION.

Congress has shown so clearly its intention that an order of the Interstate Commerce Commission which has been found by three federal judges sitting in banc to be valid should be permitted to take effect according to its terms in a case where there is no doubt as to the jurisdiction of the Commission, the stay granted by two of the three judges who presided in this case, after all three of those judges had found that the Interstate Commerce Commission was clearly correct in its conclusions and that its order was valid, should be dissolved. Section 262 of the Judicial Code gives to district courts the power to issue such writs as may be necessary to the exercise of their jurisdiction, but does not give such courts power to suspend orders of the Commission which they have declared to be valid. The court of three judges is created for a special purpose, and it has only such powers as are specifically conferred. The power of the court to grant a restraining order is limited to an order which does not extend beyond the time of its decision upon the application for an interlocutory injunction. Congress has guarded this with such great care that there is no room for doubt.

We ask that the petition and motion for a suspension of the order of the Interstate Commerce Commission pending the appeal be denied.

Respectfully submitted.

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